

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 13 November 2014

**Before**

**HIS HONOUR JUDGE PETER CLARK**

**MRS G SMITH**

**MR T STANWORTH**

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DEVON & CORNWALL POLICE AND CRIME COMMISSIONER

APPELLANT

MR A R WEAVIN

RESPONDENT

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MR GRAHAM WATSON  
(of Counsel)  
Instructed by:  
Devon Cornwall Constabulary  
Legal Services  
Middlemoor  
Exeter  
Devon  
EX2 7HQ

For the Respondent

MR ADRIAN WEAVIN  
(The Respondent in Person)

## **SUMMARY**

### **UNFAIR DISMISSAL - Reasonableness of dismissal**

The Claimant was dismissed by reason of (a) capability in performing his job, (b) loss of external accreditation necessary for the job and (c) absence of suitable alternative employment. The Employment Tribunal found dismissal for that (capability) reason unfair on two grounds relating to (a) only. Wrong approach under section 98 **Employment Rights Act**. Appeal allowed. Unfair dismissal claim dismissed.

## **HIS HONOUR JUDGE PETER CLARK**

### **Introduction**

1. This case has been proceeding in the Exeter Employment Tribunal. The parties are Mr Weavin, Claimant and Devon & Cornwall Police and Crime Commissioner, Respondent, as we shall describe them. This is an appeal by the Respondent against the Judgment of a Tribunal chaired by Employment Judge Carstairs promulgated with Reasons on 20 February 2014, upholding his complaint of unfair dismissal but limiting compensation to the basic award. A whistleblowing claim was dismissed and is not the subject of any appeal.

### **The Factual Background**

2. The Claimant commenced employment with the Respondent, or his predecessor, on 9 December 2002. He was previously employed at the Prudential in the financial services industry. On 29 September 2008 he became an accredited financial investigator (AFI). From the Tribunal's careful and detailed findings of fact it appears that his managers formed the view that he struggled with the investigative as opposed to financial aspects of the AFI role. When concerns were raised, he became defensive. His initial trainer, Mr Arscott, wrote a report raising concerns about his general investigative capabilities. A second report, on 29 June 2009, also raised performance concerns. Nevertheless, an independent agency, the National Policing Improvement Agency (NPIA), gave accreditation to the Claimant on 16 December 2009.

3. The Claimant embarked on the Respondent's grievance procedure with the assistance of his trade union. He believed that he was competent and that there was a conspiracy to remove him. The Respondent in turn commenced its formal capability procedure. A stage 1 meeting was held on 10 August 2011. In October 2011 the NPIA removed the Claimant's confiscation

accreditation; he appealed that decision. On 5 December the NPIA removed his remaining accreditation; he appealed that decision also. At a stage 2 capability meeting held on 12 December Detective Inspector Bean observed that the NPIA existed as a separate licensing body because the Respondent had power to take away liberty and remove funds from people.

4. A formal written warning for unsatisfactory performance was issued to the Claimant on 13 December. Significantly, that letter also explained that because the NPIA had revoked the Claimant's accreditation the Respondent was no longer able to employ him in his current role; accordingly, he would be placed on the redeployment register for eight weeks so that the Respondent could seek suitable alternative employment for him (see Reasons, paragraph 6.68).

5. A final stage 3 capability meeting was held on 9 August 2012 before Chief Superintendent Boulting. The Claimant was informed that the outcome could be termination of employment. Mr Boulting made clear that his function was to review the assessments conducted in terms of process, check qualifications of assessors and review expectations. He was not qualified to make judgements regarding detailed application of financial investigation responsibilities and legislation (see paragraph 6.82).

6. The outcome was dismissal on the grounds of capability. An appeal against dismissal was rejected by Chief Superintendent Davies. The Tribunal note at paragraph 6.95 Mr Davies' view that:

**“... if [sic] fundamental issue I have taken into account is the removal of your accredited status by the NPIA which itself this [sic] renders you are unable to fulfil the basic requirements of the role for which you were employed ...”**

7. It was common ground between the parties that there was no suitable alternative employment available to the Claimant at the time of his dismissal (paragraph 10.10). Further,

his NPIA accreditation remained removed at the time of dismissal (paragraph 10.1). We have been taken during the course of discussion this morning to the decision by Mr Wilkinson of the NPIA to dismiss the Claimant's appeal against removal of accreditation, that decision being made on 11 June 2012, before the dismissal which took effect on 16 August 2012.

### **The Tribunal Decision**

8. The Tribunal accepted (paragraph 10.1) that the Respondent had established a potentially fair reason for dismissal, capability. The set of facts or beliefs constituting that reason are set out by the Tribunal at paragraph 10.1 in this way:

**“The respondent first had to satisfy the tribunal that it had shown the reason for dismissal. Although the claimant disagrees with the conclusions reached by the respondent at the dismissal and appeal hearings, the Tribunal is not satisfied that the respondent had a hidden motive for dismissing the claimant. On the contrary, the respondent decision makers were faced with significant evidence given by various police officers and civilians to the effect that the claimant was not performing to the required level in his role as an AFL. Furthermore, the claimant was only able to operate in that role if he continued to be accredited by the NPIA. At the time of his dismissal, his accreditation had been removed.”**

9. They went on to find at paragraph 10.2 that there was no alternative suitable employment available for him.

10. Having identified a potentially fair reason, the Tribunal went on to consider the reasonableness question under section 98(4) of the **Employment Rights Act 1996** (ERA). They found that the Respondent had complied with its own capability procedure (paragraph 10.4); however, they found the dismissal to be unfair for two procedural reasons. First, the Respondent had not considered evidence in the Claimant's favour before dismissing him (paragraph 10.5), and, secondly, neither the decision-maker nor the appellate manager were qualified to make judgements on the Claimant's capability, nor were they informed by an objective expert regarding that matter (paragraph 10.7). Thus, having found the dismissal procedurally unfair, they went on to consider the **Polkey v A E Dayton Services Ltd** [1987]

IRLR 503 question: what were the chances of a fair dismissal had a procedure absent those defects as found been employed? They found that a fair dismissal would have been inevitable in any event (paragraph 10.11) for the reasons set out at paragraphs 10.9 and 10.10 in these terms:

**“10.9. However, the matter does not end there. Even though the respondent had not investigated the various other potential witnesses, there was still one major matter that the claimant was always unable to surmount. That was that, in order to fulfil his role as an AFI, the claimant had to be accredited by the NPIA. It should be noted that the NPIA is a national organisation completely independent from the respondent. Although it is unclear to the Tribunal why the respondent pursued both the issue of capability and capability through qualification, once accreditation had been removed, the claimant was simply not able to remain an AFI.**

**10.10. Although no detailed evidence was presented on the issue of [alternative] employment, it was agreed between the parties that there was no suitable alternative employment to which the claimant could transfer.”**

### **Section 98 ERA**

11. The Tribunal mentioned section 98 in passing at paragraph 8.2.3, where they said this:

**“Section 98 provides that it is for the employer to show the reason for dismissal and that it falls within subsection (2) or was for some other substantial reason. If the employer succeeds in that, then the Tribunal goes on to consider the fairness of the dismissal as set out in subsection (4).”**

12. Familiarity sometimes breeds contempt. Section 98 is structured, so far as is material, in this way:

(1) Has the employer shown a potentially fair reason for dismissal? Here, the Tribunal accepted the capability reason as articulated at paragraph 10.1. It is in two parts: first, the decision-makers had significant evidence from police officers and civilians that the Claimant was not performing at the required level as an AFI; secondly, he was only able to continue in the role with NPIA accreditation, and that had been removed. There was no suitable alternative employment for him. That combination of factors amounted to the capability reason (see paragraph 10.3).

(2) Section 98(2)(a) refers to the capability reason as follows:

“[a reason which] relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.”

(3) By section 98(3):

“In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.”

(4) By section 98(4) the reasonableness question, whether the dismissal is fair or unfair:

“(a) depends on whether in the circumstances ... the employer acted reasonably or unreasonably in treating *it* [my italics] as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”

“It” in section 98(4)(a) means the reason; that is, the set of facts or beliefs constituting the employer’s reason for dismissal (here, capability). That formulation goes back to Cairns LJ’s observation in **Abernethy v Mott Hay & Anderson** [1974] ICR 323, approved by the House of Lords in **Devis v Atkins** [1977] ICR 662.

### **The Appeal**

13. The key to determining this appeal lies, we think, in the Tribunal’s finding as to the Respondent’s reason for dismissal (see paragraph 10.1). The set of factors operating on the employer’s mind was (a) capability in the job, (b) loss of the NPIA accreditation and (c) the absence of suitable alternative employment. That was the reason whose sufficiency or otherwise fell to be considered under section 98(4). Mr Watson challenges each of the two findings of procedural defect made by the Tribunal. However, those findings go only to the



first of the three factors, capability in the job. What they do not address is the qualification factor, loss of NPIA accreditation, which, in the Tribunal's words (paragraph 10.9), "the Claimant was always unable to surmount".

14. In addressing us Mr Weavin makes the subjective observations, first, that his accreditation was unfairly removed by the NPIA (that is not a finding of the ET and of course fell outside the control of the Respondent) and, secondly, that the Respondent did not investigate the position fairly (again, that is not the Tribunal's finding; they found (paragraph 10.4) that the Respondent did undertake the necessary hearings under their capability procedure and found no lack of good faith in the course of the Respondent's investigation nor indeed that by employees of the NPIA).

15. We find it significant that at paragraph 10.9 the Tribunal were not clear as to why the Respondent pursued both the issue of capability and capability through qualification. It is clear to us. The expression "belt and braces" comes to mind. The Respondent had a capability procedure, and so they followed it. But equally, as the Tribunal found, they relied on the loss of accreditation following dismissal of the Claimant's appeal by Mr Wilkinson of the NPIA on 11 June 2012 prior to dismissal on 16 August. That was plainly a potentially fair reason for dismissal, absent suitable alternative employment. Like the car mechanic who lost his driving licence in **Tayside Regional Council v McIntosh** [1982] IRLR 272 EAT, Lord McDonald presiding. The Tribunal's two findings of procedural shortcomings simply do not address that part of the Respondent's reason for dismissal. In these circumstances, we shall allow this appeal.

## **Disposal**

16. Paying due regard to the recent Court of Appeal guidance in **Jafri v Lincoln College** [2014] IRLR 544 and **Burrell v Micheldever Tyre Services Ltd** [2014] IRLR 630, we are satisfied that this is a case in which we can and should exercise our power to reverse a Tribunal finding of unfair dismissal based on the findings of this Employment Tribunal and substitute a declaration that the claim fails and is dismissed.